Supreme Court, U.S.
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CASE NO. 90-1778

IN THE
Supreme Court of the United States

October Term, 1990

HARRY K. SINGLETARY
Secretary, Department of Corrections
Petitioner,

v.

STEPHEN TODD BOOKER,
Respondent.

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether review should be granted to allow this Court to decide the standard to be applied in determining the harmlessness of any violation of *Hitchcock v. Dugger,* 481 U.S. 393 (1987), a matter left unresolved in the original opinion, and currently the source of irreconcilable conflict between the state and federal courts below?

Whether the Court of Appeals has misapplied *Hitchcock v. Dugger,* in finding any violation thereof in this case to be harmful, when, in reaching such conclusion, the Court of Appeals: (a) considered evidence which had never been presented to the original sentencer in 1978; (b) focused exclusively upon the effect that the excluded evidence would have had upon the jury (when, under Florida's capital sentencing structure, the judge is the sentencer), and (c) failed entirely to consider or weigh the countervailing factors found in aggravation?

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II. THE COURT OF APPEALS HAS MISAPPLIED *HITCHCOCK V. DUGGER*, IN FINDING ANY VIOLATION THEREOF IN THIS CASE TO BE HARMFUL, WHEN, IN REACHING SUCH CONCLUSION, THE COURT OF APPEALS: (A) CONSIDERED EVIDENCE WHICH HAD NEVER BEEN PRESENTED TO THE ORIGINAL SENTENCER IN 1978; (B) FOCUSED EXCLUSIVELY UPON THE EFFECT THAT THE EXCLUDED EVIDENCE WOULD HAVE HAD UPON THE JURY (WHEN, UNDER FLORIDA'S CAPITAL SENTENCING STRUCTURE, THE JUDGE IS THE SENTENCER), AND (C) FAILED

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ENTIRELY TO CONSIDER OR WEIGH THE COUNTERVAILING FACTORS FOUND IN AGGRAVATION.

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Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) . . . . . *passim*

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STATEMENT OF THE CASE

Petitioner continues to rely upon the Statement of the Case set forth in the petition itself, and would briefly respond to some of the assertions in Respondent's statement in the Brief in Opposition:

Respondent contends, "Mr. Booker was sentenced to death during a period of great confusion in Florida as to the scope of permissible mitigation in capital cases." (Brief in Opposition at 1-2). Respondent also points out that the advisory sentencing proceeding before the jury in this case took place prior to the rendition of this Court's decision, *Lockett v. Ohio,* 438 U.S. 586 (1978) (Brief in Opposition at 2). Finally, Respondent Booker itemizes ten items of mitigating evidence which "in some unfathomable combination" could have led to a life sentence (Brief in Opposition at 4-13). Petitioner would respectfully take issue with all of the above.

As to any alleged "confusion" at the time of Booker's sentencing, the record in this case reflects, as noted in the petition, that defense counsel Bernstein at the time of the penalty phase before the jury on June 22, 1978, sought to introduce nonstatutory mitigation, *i.e.,* testimony from Booker to the fact he would have entered a plea to a lesser charge, if offered. In support of the argument that this nonstatutory testimony should have been admitted, defense counsel argued that it was material to the question that the jury would be deciding and what recommendation they would return, and further, that it was relevant under the case law (Transcript at 588). During the interval between the jury proceeding and formal sentencing before the judge, defense counsel filed a motion to strike the death penalty, on July 19, 1978, on the grounds that the Florida statute violated *Lockett;* the motion was denied prior to the sentencing proceeding before the judge (state record at 133-137,

141). Thus, the facts indicate that defense counsel was not "inhibited" or "confused" by the state of the law at the time of Booker's sentencing, and that, well prior to the actual imposition of sentence by the judge, all parties — defense counsel, prosecutor and judge — were on actual notice of *Lockett*.

As to the ten items of proposed mitigation, Petitioner would respectfully suggest that Respondent has adopted the same myopic approach as the Court of Appeals below. In *Booker v. Dugger,* 520 So.2d 246, 249 (Fla.) *cert. denied,* the Florida Supreme Court in finding any error *sub judice* under *Hitchcock v. Dugger,* 481 U.S. 393 (1987) to be harmless, specifically noted the many conflicts in evidence, such conflicts discussed at length in the opinion [Appendix to Petition at A40-A41].

REASONS FOR GRANTING THE WRIT

I. REVIEW SHOULD BE GRANTED TO ALLOW THIS COURT TO DECIDE THE STANDARD TO BE APPLIED IN DETERMINING THE HARMLESSNESS OF ANY VIOLATION OF *HITCHCOCK V. DUGGER* 481 U.S. 393 (1987), A MATTER LEFT UNRESOLVED IN THE ORIGINAL OPINION, AND CURRENTLY THE SOURCE OF IRRECONCILABLE CONFLICT BETWEEN THE STATE AND FEDERAL COURTS BELOW.

In the instant Brief in Opposition, Booker contends that no conflict exists between the Florida Supreme Court and the United States Court of Appeals for the Eleventh Circuit on the issue of harmless error under *Hitchcock v. Dugger,* 481 U.S. 393 (1987), because the courts, in fact, applied the same test, *i.e.,* that set forth in *Chapman v. California,* 386 U.S. 18 (1967)(Brief in Opposition at 13-19). Booker maintains this position, even while conceding that, in several instances, such as the decision of the Florida Supreme Court below, *Chapman* has not been expressly cited by either court (Brief in Opposition at 16-18). Respondent bases this universal conclusion upon the fact that all courts, in determining in whether the *Hitchcock* error merited reversal, considered whether such error was harmless "beyond a reasonable doubt" (Brief in Opposition at 14-19). Petitioner would respectfully contend that the above arguments are singularly unconvincing.

To Petitioner, there is no magic in the phrase, "harmless beyond a reasonable doubt." Certainly, it would not appear from the face of the *Chapman* opinion itself that this Court was aware that it was coining a new term of art. The State would respectfully contend that any error which is truly

harmless ***should*** be harmless beyond reasonable doubt. Petitioner cannot imagine that any advocate would urge a reviewing court to affirm a conviction, upon a finding that an error committed had been "somewhat" harmless or "harmless beyond some but not all doubt." The fact that various panels of the Eleventh Circuit have incanted the phrase "harmless beyond a reasonable doubt," in both their affirmances and reversals, does not mean that they are applying the same legal standard or one which is in conformity with that utilized by the state courts. Petitioner maintains his position that certain panels of the Eleventh Circuit, in determining the harmfulness of any *Hitchcock* error, fail to consider the entire record, and, specifically, fail to acknowledge the existence of aggravating circumstances and/or the role of the sentencing judge. Because the state courts do consider these factors, *see Booker v. Dugger, supra,* there is, in fact, conflict, and exercise of this Court's certiorari jurisdiction is warranted.

Further, Respondent's rosy view of harmony within the Eleventh Circuit is not only at odds with reality, but also with what the Eleventh Circuit itself has said on the subject. As noted in the petition, the panels in two Eleventh Circuit decisions, *Tafero v. Dugger,* 873 So.2d 249 (11th Cir.1989), *cert. denied,* ____U.S.____, 110 S.Ct. 1834 (1990) and *Delap v. Dugger,* 890 F.2d 285 (11th Cir.1989), *cert. denied,* ____U.S.____, 110 S.Ct. 2628 (1990), have expressly held that intra circuit conflict exists on this issue. *See e.g. Tafero* 873 So.2d 252 n.5 ("We are aware of conflicting viewpoints in this circuit concerning the application of a harmless *Hitchcock* error standard."): *Delap,* 890 F.2d at 306 n.23 ("There is some disagreement in this circuit as to the proper role of the habeas court in weighing aggravating and mitigating evidence in the *Hitchcock situation.*"). Booker nowhere mentions these holdings, nor does he acknowledge the most recent decision on this subject, *Gore v. Dugger,* 933 F.2d 904 (11th Cir.1991). In such decision, the Eleventh

Circuit affirmed the district court's granting of relief based upon *Hitchcock,* in a summary five paragraph opinion. In pertinent part, this opinion reads:

> ...The district court discussed and analyzed all the recent opinions of our court, and drew certain conclusions about the scope of this harmless error doctrine when applied in *Lockett / Hitchcock* situations.
>
> It seems apparent from the number of various opinions, special concurrences, and dissents written by the judges of our court that some disagreement remains with respect to the issue of the scope of the harmless error doctrine in such situations. However, in this matter, we need not wrestle with such larger questions. This panel unanimously agrees that under the circumstances of this particular trial the omission of the nonstatutory mitigating evidence in violation of the *Lockett / Hitchcock* principle cannot be found to be harmless. We therefore *Affirm* the judgment of the district court, but decline to adopts its conclusions regarding the scope of the harmless error doctrine when applied in *Lockett / Hitchcock* situations.
>
> *Gore,* 933 F.2d at 905.

The *Gore* opinion, which is reproduced in its entirety in the appendix to this pleading, is important in several respects. For one thing, it represents yet another recognition by the Eleventh Circuit that conflict in fact exists on the question at bar. For another, it clearly suggest that, not only is there "disagreement" between the various judges of the court on the issue of harmless error under *Hitchcock,* but that, quite literally, the Eleventh Circuit has no intention of resolving this issue now, or in the foreseeable future. Because the *Gore* panel felt that the district court had reached

the correct result, although, apparently, for the wrong reasons, it affirmed the granting of relief, observing that it did not need to "wrestle with the larger question" of what law to apply. Apparently, the State is to be comforted by the fact that the three individual judges on this panel, each apparently applying his own secret and unknown view of the law, unanimously concluded that the death sentence had to be vacated. Unsurprisingly, the State finds little comfort in this result, and would further note that not only is the *Gore* decision entirely bereft of any statement of law, it is also lacking any discussion of the operative facts. In the Brief in Opposition, Booker chastises Petitioner for failing to recognize that the Eleventh Circuit's *Hitchcock* analysis is "intensely fact-specific" (Brief in Opposition at 21). This statement is obviously a canard, and, unless this Court intervenes, the Eleventh Circuit will no doubt continue to summarily vacate Florida sentences of death based upon its own "unfathomable" views on *Hitchcock*. Petitioner respectfully urges this Court to grant review and to "wrestle with the larger question" involved, a task which the Court of Appeals is unwilling, or unable, to do.

II. THE COURT OF APPEALS HAS MISAPPLIED *HITCHCOCK V. DUGGER*, IN FINDING ANY VIOLATION THEREOF IN THIS CASE TO BE HARMFUL, WHEN, IN REACHING SUCH CONCLUSION, THE COURT OF APPEALS: (A) CONSIDERED EVIDENCE WHICH HAD NEVER BEEN PRESENTED TO THE ORIGINAL SENTENCER IN 1978; (B) FOCUSED EXCLUSIVELY UPON THE EFFECT THAT THE EXCLUDED EVIDENCE WOULD HAVE HAD UPON THE JURY (WHEN, UNDER FLORIDA'S CAPITAL SENTENCING STRUCTURE, THE JUDGE IS THE SENTENCER), AND (C) FAILED ENTIRELY TO CONSIDER OR WEIGH THE COUNTERVAILING FACTORS FOUND IN AGGRAVATION.

In the petition for writ of certiorari, the State identified three specific respects in which the panel below erred in finding the *Hitchcock* error *sub judice* to be harmful. *See Booker v. Dugger,* 922 F.2d 633 (11th Cir.1991). Petitioner pointed out that the panel had considered evidence outside the record, had failed to take into account the role of the sentencing judge and had entirely failed to consider the facts or factors found in aggravation as part of the death sentence (Petition at 16-25). In the instant Brief in Opposition, Booker's only response to the first allegation is that, essentially, the Eleventh Circuit's discussion of the unpresented evidence in mitigation was *dicta* (Brief in Opposition at 23-25). Thus, Booker apparently concedes that claims of *Hitchcock* error are limited to instances in which the jury has failed to consider evidence actually presented before it, as opposed to evidence later proffered in collateral proceedings, and offers no justification for the panel's reference to

this "additional evidence." Booker's responses to Petitioner's other allegations deserve more attention.

As to the claim involving the judge's role in sentencing, Respondent contends that Petitioner completely "misunderstands Florida Law" and that, in fact, under Florida Law, "any harmful jury sentencing error" results in a new jury sentencing trial. (Brief in Opposition at 26, 33, 29); apparently, the support for this latter dubious assertion is yet another precedent of the Eleventh Circuit, *Mann v. Dugger,* 844 F.2d 1446 (11th Cir.1988)(in banc.), *cert. denied,* 489 U.S. 1071 (1989), such decision directly disavowed by the Florida Supreme Court. *Combs v. State,* 525 So.2d 853, 855-858 (Fla. 1988). Respondent also maintains that, because the sentencing judge in this case gave a deficient jury instruction, under *Hitchcock,* he is, under certain precedent, presumed to have followed such himself (Brief in Opposition at 27, n.19). Neither of these contentions is accurate.

It will, of course, be up to this Court to determine which of the parties misunderstands Florida law, but Petitioner respectfully suggests, that if there is one impeachable source on the subject, it is the Supreme Court of Florida. In finding the *Hitchcock* error *sub judice* to be harmless, the Florida Supreme Court made the following specific finding:

> We are convinced beyond a reasonable doubt that even with the proper jury instruction and without the prosecutor's compounding comment, the jury would not have made the recommendation for life imprisonment. There was simply no nonstatutory mitigating evidence sufficient to offset the aggravating circumstances upon which the jury could have reasonably predicated such a recommendation. We are also convinced beyond a reasonable doubt that the judge would have sentenced Booker to death regardless of the juror's recommendation

> and that an override would have been consistent with the rationale of *Tedder v. State,* 522 S.2d 908 (Fla. 1975).
>
> *Booker,* 520 So.2d at 249 [Appendix to Petition at A42].

Respondent has done nothing to call into question the correctness or the propriety of the above finding nor to justify the federal courts' utter failure to afford it any deference. *Cf. Barclay v. Florida,* 463 U.S. 939 (1983); *Wainwright v. Goode,* 464 U.S. 78 (1983). Further, it is clear that there can be no reason to "presume" that the judge's view of the law was identical to that of the jury, based upon the instruction which he gave the jury during their proceeding, given the fact, as noted, that *Lockett* was decided prior to the judge's actual imposition of sentence and, again as noted, all parties, including the judge, were on actual notice of the holding of *Lockett.* The State maintains its view that the sentencing judge in this case rejected the proffered evidence in mitigation, not because he could not properly characterize it, but because he simply did not find it to be mitigating; the judge found that Booker's "Aniel" syndrome was self-serving and bereft of any believable fact, that Booker was the master manipulator of his actions at the time of the crimes and that Booker had been an antisocial, hostile individual who had learned at an early age that he could get what he wanted by illegal acts or by manipulating others. [Appendix to Petition at A73-A76].

Finally, Booker's suggestion that, in determining the harmfulness of any *Hitchcock* error, the State is asking the federal courts to "reweigh" the sentencing factors or to act as sentencers themselves (Brief in Opposition at 35-36) is simply incorrect. What Petitioner seeks is that, in reviewing a *Hitchcock* claim, a federal court simply adopt an analysis more in conformity with that utilized in *Strickland v.*

Washington, 466 U.S. 668 (1984). In such latter precedent, when determining whether defense counsel's ineffectiveness has prejudiced a capital defendant to the extent that his sentence of death has been rendered unreliable, this Court, as well as all others following *Strickland v. Washington,* consider the effect of the error upon the weighing process itself—the balance of the aggravating and mitigating circumstances. No less should be required when a claim of *Hitchcock* error is considered. Relief cannot be afforded simply based upon the fact that a reviewing court finds some evidence of an arguably mitigating nature somewhere in the record; rather, the court must consider the effect of any *Hitchcock* error upon the balance of the aggravating and mitigating circumstances. Because the court below entirely failed to even acknowledge the existence of substantial aggravation in this case, its *Hitchcock* analysis is seriously flawed, and certiorari should be granted.

CONCLUSION

WHEREFORE, for the aforementioned reasons, Petitioner respectfully prays that the petition for writ of certiorari will be granted.

Respectfully submitted,

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APPENDIX TO REPLY TO BRIEF IN OPPOSITION

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Opinion of United States Court of Appeals—
Eleventh Circuit, *Gore v. Dugger,* 933 F.2d 904
(11th Cir. 1991) A-1

David Alan GORE,
Petitioner-Appellant-Cross-Appellee,

v.

Richard L. DUGGER, Secretary, Florida Department of Corrections,
Respondent-Appellee-Cross-Appellant.

No. 89-4026.

United States Court of Appeals, Eleventh Circuit.

May 29, 1991.

After defendant's first-degree murder, kidnapping and sexual battery convictions were affirmed on direct appeal, 475 So.2d 1205, defendant petitioned for habeas relief. The United States District Court for the Middle District of Florida, 89-203-CIV-T-10C, Wm. Terrell Hodges, J., granted partial relief, ___ F.Supp. ___, and appeal was taken. The Court of Appeals held that preclusion of nonstatutory mitigating evidence in violation of *Lockett / Hitchcock* principle was not harmless.

Affirmed.

Billy Nolas, Julie D. Naylor, Tallahassee, Fla., for petitioner-appellant, cross-appellee.

Ralph Barreira, Asst. Atty. Gen., Miami, Fla., for respondent-appellee, cross-appellant.

Appeals from the United States District Court for the Middle District of Florida.

Before TJOFLAT, Chief Judge, and FAY and JOHNSON, Circuit Judges.

PER CURIAM:

The district court granted partial relief in this petition filed pursuant to 28 U.S.C. § 2254. The state appeals the granting of relief. The petitioner cross-appeals the denial of relief as to those claims found to be without merit. We affirm.

Petitioner was convicted of first degree murder, two counts of kidnapping, and three counts of sexual battery. He was sentenced to death for the first degree murder count. Sentences of life imprisonment were imposed on the kidnapping and sexual battery counts. These convictions and sentences were affirmed on appeal, and petitioner's post-conviction remedies under state law have been exhausted.

On consideration of Gore's *habeas corpus* petition, the district court conducted a detailed analysis of each of the seventeen claims presented and entered a comprehensive and scholarly Memorandum Opinion published at ___ F.Supp. ___ (M.D.Fla. 1989). We agree with the findings and conclusions of the district court as set forth in its opinion.

We clarify our ruling, however, in one regard. Gore claimed that his rights under the sixth, eighth, and fourteenth amendments were violated when the state trial court precluded him from presenting certain mitigating evidence to the sentencing jury in violation of *Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) and *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973

(1978) (plurality opinion).[1] The district court agreed. However, it then went on to recognize that under the law of our circuit such a violation is subject to the harmless error doctrine. *See Jones v. Dugger,* 867 F.2d 1277, 1279 (11th Cir.1989). The district court discussed and analyzed all of the recent opinions of our court, and drew certain conclusions about the scope of this harmless error doctrine when applied in *Lockett/Hitchcock* situations.

It seems apparent from the number of various opinions, special concurrences, and dissents written by the judges of our court that some disagreement remains with respect to the issue of the scope of the harmless error doctrine in such situations. However, in this matter, we need not wrestle with such larger questions. This panel unanimously agrees that under the circumstances of this particular trial, the omission of the nonstatutory mitigating evidence in violation of the *Lockett/Hitchcock* principle cannot be found to be harmless. We therefore **AFFIRM** the judgment of the district court, but decline to adopt its conclusions regarding the scope of the harmless error doctrine when applied in *Lockett/Hitchcock* situations.

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1 Under *Hitchcock* and *Lockett,* the eighth amendment requires that a capital sentencing jury "not be precluded from considering, as a mitigating factor, *any* aspect of a defendant's character or record that the defendant proffers as a basis for a sentence less than death." *Jones v. Dugger,* 867 F.2d 1277, 1279 (11th Cir.1989) (emphasis in original) (citations omitted).